United States Department of Labor
Board of Alien Labor Certification Appeals
Washington, D.C. 20001

'Notice: This is an electronic bench opinion which has not been verified as official'
Date: August 25, 1997

Case No. 95 INA 677

In the Matter of:

LEONORA BIZZARI,
Employer

on behalf of

JOLANTA MARCINKOWSKA,
Alien

Appearance: P. W. Janaszek of New York, New York, Agent

Before : Holmes, Huddleston, and Neusner
Administrative Law Judges

FREDERICK D. NEUSNER
Administrative Law Judge

DECISION AND ORDER

This case arose from a labor certification application that was filed on behalf of JOLANTA MARCINKOWSKA (Alien) by LEONORA BIZZARI (Employer) under § 212(a)(5)(A) of the Immigration and Nationality Act, as amended, 8 U.S.C. § 1182(a)(5)(A) (the Act), and the regulations promulgated thereunder, 20 CFR Part 656. After the Certifying Officer (CO) of the U. S. Department of Labor at New York, New York, denied this application, the Employer and Alien requested review pursuant to 20 CFR § 656.26.[1]

Statutory Authority. Under § 212(a)(5) of the Act, an alien seeking to enter the United States for the purpose of performing skilled or unskilled labor may receive a visa if the Secretary of Labor (Secretary) has determined and certified to the Secretary of State and to the Attorney General that (1) there are not sufficient workers who are able, willing, qualified, and

[1]The following decision is based on the record upon which the CO denied certification and the Employer's request for review, as contained in an Appeal File (AF), and any written argument of the parties. 20 CFR § 656.27(c).

available at the time of the application and at the place where the alien is to perform such labor; and (2) the employment of the alien will not adversely affect the wages and working conditions of the U. S. workers similarly employed. Employers desiring to employ an alien on a permanent basis must demonstrate that the requirements of 20 CFR, Part 656 have been met. These requirements include the responsibility of the Employer to recruit U.S. workers at the prevailing wage and under prevailing working conditions through the public employment service and by other reasonable means in order to make a good faith test of U. S. worker availability.[2]

STATEMENT OF THE CASE

This case involves an application (ETA 750A) for the permanent employment of the Alien as an Italian Household Cook with the following duties:

> Plans menus and cooks Italian style dishes, dinners, desserts according to recipes of Italian cuisine. Cooks layered fresh pasta with chicken, mushrooms and cheese, Raviolacci Stuffed with Spring herbs and Cheese, Garden Style Whole Wheat Pappardelle. Portions and garnishes the food. Purchases food supplies and accounts for the expenses incurred.

The Employer specified in the ETA 750A that the Alien was to work a basic forty hour week without overtime. The hours were noted to be from 9:00 A.M. to 6:00 P.M., at $12.81 per hour. Employer further stated that the position required high school graduation plus two years of experience in the job offered by way of qualification for the position. The following statement from the Employer was later added to the ETA 750A:

> Please be advised that I have an opening for a position Cook Italian, Live-Out in my household. I have three children: a six years old boy, eleven years old daughter and a fifteen years old daughter. My children require proper nutritious meals to be served on a regular basis. I am employed full-time. My job is very demanding and I cannot provide them with regular meals and purchase the necessary foodstuffs. Our family member is performing child-care duties.
>
> The opening I have at the present time is for full-time, permanent position of Cook Italian, Live-out.

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[2]Administrative notice is taken of the Dictionary of Occupational Titles, published by the Employment and Training Administration of the U. S. Department of Labor.

> I do not employ any US workers in my household. The house chores are performed by members of my family and an occasional outside help paid on an hourly rate. At the present time the meals are prepared by a relative who for her personal reasons will not be able to do this in the near future.
>
> The meals served in our house have to be prepared in accordance with the tradition of Italian cuisine due to our ethnic background.

AF 01.

The Alien's qualifications were stated in the Form ETA 750B as part of this application. A native of Poland, she said she was currently in the United States on a B-2 Visa, that she was a high school graduate, and that she had worked as an Italian Cook for a family in the United States for about five years. AF 03.

Notice of Findings. The CO's Notice of Findings proposed to deny the application on grounds that it did not appear that the within the meaning of 20 CFR § 656.50, subject to Employer's rebuttal. The CO advised the Employer that she could rebut this finding by amending the job duties or by submitting evidence that the job constitutes full time employment and that it had been customarily required by the Employer. The evidence specified by the CO to support Employer's application included the following:

> State the number of meals prepared daily and weekly; the length of time required to prepare each meal; identify the individuals for whom the worker is preparing each meal on a daily and weekly basis; provide a representative one week schedule accounting for eight hours per day/40 hours per week.
>
> If you are claiming you need to employ a cook on a full-time basis because you entertain frequently, you must describe in detail the frequency of household entertaining during the preceding twelve (12) month period. List the dates of entertainment, the nature of the entertainment, guests, the number of meals served, the time and duration of the meal, etc.
>
> Will the worker be required to perform duties other than cooking, i.e., houseworker, child care, home attendant? If yes, list each duty and the frequency of performance.
>
> Evidence employer has employed full-time cooks in the past, i.e., copies of tax and/or social security report forms. If it is your position that your "relative" has been performing these duties, you must supply evidence to support that your

"relative" was performing cooking duties exclusively eight hours per day, five days/forty hours per week. Please indicate when this "relative" started performing these duties.

Who will perform the general household maintenance duties, such as cleaning, laundry, vacuuming, etc.? If it is your position that the cleaning duties are performed by a “part time help who comes in occasionally”, you must supply evidence to support, i.e., bills and canceled checks for the last 12 months.

Any other information and evidence that clearly establishes and demonstrates that this is a permanent, full-time job offer that employer customarily has required.

The CO also requested evidence as to the care to be provided for Employer’s children while the parent(s) were absent from the home.

Rebuttal. Employer's rebuttal explained that the household members include herself, her husband, their three children, and her husband's mother. She said that she was employed from 10:00 A.M. to 6:00 P.M., that her husband was employed from 9:00 A.M. until 5:00 P.M., that their children attended school from 8:30/ 9:00 A.M. until 3:00 P.M., and that her mother-in-law remained home during the day. She said her mother-in-law previously had spent eight hours per day/forty hours per week cooking for the family in exchange for room and board, but no longer could perform this household function because her asthmatic condition had deteriorated significantly. As a result, the family either was eating out or was ordering delivery of ready to eat meals. While her mother-in-law did provide child care for the youngest child when he returned from school, the Employer and her husband performed the other household duties with help from their children.

The Employer's schedule of work for the position indicated that the Cook would prepare breakfast for the Employer and her mother-in-law; lunches for all six family members would be prepared a day in advance and taken to work or to school; an afternoon meal was required for the children and the mother-in-law; dinner and an evening meal were to be prepared and served for all six family members. The cook also was required to prepare additional dinners on Friday's for five to ten guests, and to prepare lunch, dinner and evening snacks for Saturday and Sunday. The meals are required to be low in fats/cholesterol/sodium while being rich in fiber, calcium and minerals. The cook’s duties would also include daily shopping to ensure the freshness of the ingredients of the meals to be prepared.

The Employer also submitted copies of recipes by which the

Employer contended illustrated the length of time that the preparation of each meal required. Examination of these recipes indicates that they are taken from two cook books. Each of these recipes include their respective preparation times which ranged from 10 to 20 minutes. Cooking times ranged from 2 to 30 minutes.[3]

Final Determination. The CO's Final Determination denied the application for alien labor certification on the grounds that the Employer had failed to meet the requirements of 20 CFR, Part 656. The CO said it did not appear that the activities described in Employer's rebuttal would require or consume eight hours per day, forty hours per week, saying it "appears rather, that the position of 'Cook' was created solely for the purpose of qualifying the Alien for a visa as a skilled worker."

Appeal. The Employer requested a review of the denial of her application and the Appellate File was referred to the Board.

DISCUSSION

Under 20 CFR § 656.3, Employment means permanent full time work by an employee for an employer other than oneself. While the CO's determination focused on whether or not the Employer had offered employment that was full time, our review indicates that this application contains at least one other defect which makes it necessary to vacate the CO's finding and order. Specifically, the Employer's position requires two years of specialized cooking experience.

This hiring criterion, which the CO did not discuss in the NOF or the Final Determination, appears on its face to be unduly restrictive. The practical effect of requiring two years of experience in the job duties of Italian cooking is to eliminate any U. S. worker who has two years of cooking experience, but no experience in Italian cooking.

Moreover, we are concerned that the CO's finding as to the existence of an offer of full time employment has confused the issue of business necessity of this unduly restrictive job requirement with the application of 20 CFR § 656.3 in determining whether the Employer's offer is for forty hours per week of

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[3]One set of recipes is for such dishes as Italian Deli Salad, Radiatore Vegetable Pasta Salad, Decathlon Macaroni Salad, Green Beans and Tomatoes Italian, Vegetable Casserole, Grilled Vegetables Romano, Skillet Pasta with Mozzarella, Runners Favorite Macaroni and Cheese and Parmesan Pasta Florentine. The other set of recipes included such dishes as Stuffed Breast of Veal, Chicken in the Pot, Goose or Turkey Soup, Braised Lamb Shanks, Lentil Soup with Frankfurters, Split Pea Soup, Chicken Soup, Braised Shoulder of Veal and Pot Roast of Brisket.

employment.

For these reasons we cannot conclude that the CO's Final Determination is reasonable or supported by sufficient evidence in the records as a whole. Consequently, this matter will be remanded to the CO with instructions to consider whether the Employer's requirement of two years of experience in cooking Italian foods is unduly restrictive and requires a showing of business necessity under 20 CFR § 621(b)(2)(i)(B), which provides that unless such special qualifications are adequately documented as arising from Employer's business necessity, the job requirements shall be those normally required for the position in the United States, as set forth in the DOT. If it is again found that full time employment is not being offered in this job, the CO may also develop additional evidence on that further issue upon remand.

Accordingly, the following order will enter.

ORDER

1. The Certifying Officer's denial of labor certification is hereby Vacated.

2. This application is hereby Remanded to the Certifying Officer for such further action as shall be deemed appropriate in accordance with this decision.

For the Panel:

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FREDERICK D. NEUSNER
Administrative Law Judge

NOTICE OF OPPORTUNITY TO PETITION FOR REVIEW: This Decision and Order will become the final decision of the Secretary of Labor unless within 20 days from the date of service, a party petitions for review by the full Board of Alien Labor Certification Appeals. Such review is not favored, and ordinarily will not be granted except (1) when full Board consideration is necessary to secure or maintain uniformity of its decisions, or (2) when the proceeding involves a question of exceptional importance. Petitions must be filed with:

Chief Docket Clerk
Office of Administrative Law Judges
Board of Alien Labor Certification Appeals
800 K Street, N.W., Suite 400
Washington, D.C. 20001-8002

Copies of the petition must also be served on other parties, and should be accompanied by a written statement setting forth the date and manner of service. The petition shall specify the basis for requesting full Board review with supporting authority, if any, and shall not exceed five, double-spaced, typewritten pages. Responses, if any, shall be filed within 10 days of service of the petition and shall not exceed five, double-spaced, typewritten pages. Upon the granting of the petition the Board may order briefs.

BALCA VOTE SHEET

Case No. 95 INA 677

LEONORA BIZZARI, Employer
JOLANTA MARCINKOWSKA, Alien

PLEASE INITIAL THE APPROPRIATE BOX.

	CONCUR	DISSENT	COMMENT
Holmes			
Huddleston			

Thank you,

Judge Neusner

Date: August 5, 1997